SERVED: May 23, 2000

NTSB Order No. EA-4842

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of May, 2000

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. PAUL JAY RICHARDSON, Respondent.	Docket SE-15795

ORDER DENYING RECONSIDERATION

By Order EA-4820, served January 28, 2000, the Board reversed an emergency order of the Administrator, affirmed by the law judge, that revoked respondent's Airline Transport Pilot certificate. The order alleged that respondent had intentionally falsified the aircraft type rating applications of seven airmen whose names appeared on application forms he had signed in blank at the behest of an FAA-Designated Pilot Examiner (DPE) named James Carey. We concluded that respondent's signature as instructor on the blank applications could not constitute an intentional falsification in the face of the law judge's assessment that the respondent did not knowingly participate in an apparent effort by Mr. Carey to circumvent an FAA policy that would not permit him to both train and flight test applicants for type ratings. The Administrator has filed a petition seeking expedited reconsideration of our decision on grounds of newly discovered evidence. We will deny the petition, to which the respondent has filed a reply in opposition.

In order to obtain reconsideration or rehearing in an emergency action, a party must show that it has acquired information ("new matter") that "could not have been discovered by the exercise of due

diligence prior to the date the case was submitted to the Board."[1] The new matter the Administrator advances in support of her petition, specifically, the post-hearing discovery of additional rating forms signed by respondent and the deposition testimony of Mr. Carey taken during pre-hearing discovery in an enforcement case against his certificates, does not meet this standard.[2]

The law judge was well aware, by the date of the hearing, of the probability that respondent had signed in blank more than the seven forms originally identified in the complaint. Thus, the fact that the Administrator subsequently located additional forms, in her possession all along and, apparently, easily retrievable, would not support rehearing even if the Administrator could establish that she should be excused for not looking for them sooner than she did.[3] The law judge made his credibility assessment notwithstanding his knowledge of the likely existence of other instances of the kind of conduct against which the complaint was directed. This new matter would therefore not warrant further scrutiny.

With regard to the proffered deposition of Mr. Carey, the Administrator maintains that his testimony contradicts the respondent's account of the matter and demonstrates that he was a knowing and willful participant in Mr. Carey's allegedly unauthorized efforts to train and test type rating applicants.[4] While the Administrator's petition fairly describes Mr. Carey's testimony, the threshold issue before us is not whether Mr. Carey's deposition

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[1]Section 821.57(d), 49 C.F.R. Part 821.

[2]The Administrator asks that we reconsider our determination that the respondent was "duped" by DPE Carey. We did not so determine. Rather, we accepted, as a matter of deference to a credibility finding we had no reason to overturn, the law judge's characterization of the respondent's state of mind. Moreover, since duped denotes deception, the Administrator's assertion (Petition at 3) that the law judge made no express finding that respondent had been deceived into signing the forms is untenable.

[3]On the issue of diligence concerning the additional forms, the Administrator asserts, among other unmeritorious factors, that she would have appreciated the need to look further if she had known before the hearing that respondent's defense would be that he had signed the forms in blank. Assuming that a failure to anticipate a defense should ever be relevant to the question of diligence, it is unavailing here since the Administrator's investigation did not include talking to the respondent. A prosecutor who makes no attempt to question the target of suspected violations does not, in our view, meet minimal expectations as to the proper conduct of a thorough and careful enforcement inquiry.

[4]Mr. Carey's deposition testimony is not, contrary to the Administrator's apparent belief in her petition, entitled to greater weight than respondent's hearing testimony. Without attempting to assess whose testimony might be more influenced by self-interest, only the respondent's testimony has, to date, been subject to cross examination and credited by a neutral factfinder.

raises doubts about the truthfulness of respondent's insistence that he had no intent to facilitate any plan Mr. Carey may have had to circumvent FAA policy. The sole issue before us here is, rather, whether the Administrator could have obtained Mr. Carey's version of events relating to the forms prior to the submission of the case to the Board.[5] As to that point, the Administrator, whose investigators appear not even to have tried to talk to Mr. Carey informally in connection with their probe of respondent, makes no claim that she was not able to question or depose Mr. Carey either in preparing her case against the respondent prior to issuing an order or in preparation for his hearing.[6] It follows that there is no basis for concluding that Mr. Carey's testimony could not have been timely discovered by the exercise of due diligence.

In the absence of new matter justifying the acceptance of the Administrator's petition under our rules, we will not address her numerous, mostly repetitive, arguments to the effect that signing the application forms in blank should, without more, be sufficient to prove a charge of intentional falsification. Although we continue to believe, as our original decision demonstrates, that such conduct reflects exceptionally poor judgment, perhaps even conduct that should be prohibited by regulation, we are not persuaded that a certificate holder's intent should not be considered.[7]

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for reconsideration and rehearing is dismissed.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.

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[5]The Administrator's exhortation that she could not reasonably have foreseen that Mr. Carey had any information relevant to the charges against the respondent until his defense was developed at his hearing is frivolous. The simple fact that Mr. Carey's name appeared on all of the rating application forms signed by the respondent defeats any claim that due diligence did not dictate that some attempt be made to ascertain what he might know about respondent's training certifications.

[6]Also frivolous is the suggestion that the Administrator did not have time to depose Mr. Carey because this was an emergency case, subject to a shortened timeframe for discovery. The Administrator, of course, controls both the nature and length of any investigation leading to the determination that emergency exists and the actual timing of the initiation of such cases.

[7]Administrator v. Bielecki, et al., NTSB Order EA-4222 (1994), is not controlling precedent for this case, as the Administrator insists. The dispositive difference being that the law judge in that action did not believe the respondents' claims as to why they had signed their own training forms in blank.